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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/501,434	11/17/2004	Peter Baur	CS-8269/LcA 35,439	7607
7590 Patent Department Bayer CropScience 100 Bayer Road Pittsburgh, PA 15205-9741			EXAMINER SULLIVAN, DANIELLE D	
			ART UNIT 1609	PAPER NUMBER
			MAIL DATE 09/27/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/501,434

Applicant(s)

BAUR ET AL.

Examiner

Danielle Sullivan

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 10 March 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 17-36 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 17-36 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 03/10/2005
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 21, 22, 28, 33 and 34 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "about" renders the claim indefinite, because one having ordinary skill in the art would not be able to understand the relative degree of the range being claimed. Therefore, the range of percent weight as well as the weight ratio can vary and are indefinite.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir.

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1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 17-19, 21, 22, 26 and 34 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 9 of copending Application No. 10/474,115 (US 2004/0157743) in view of Baron et al. (US 2004/0052878).

Although the conflicting claims are not identical, they are not patentably distinct from each other because the method and composition of the copending application '115 recites an insecticidally active compound from the group of the neonicotinyls, instead of herbicidally active triazolinones as claimed in the instant application. Copending application claims a fatty alcohol ethoxylate of the formula  $\text{CH}_3-(\text{CH}_2)_m-\text{CH}_2-(\text{-O-CH}_2-\text{CH}_2)_n-\text{OH}$  in which m represents average values from 8 to 13 and n represents average values from 6 to 17 and a method of use. The variable Q disclosed in the

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present invention is equivalent to  $\text{CH}_3-(\text{CH}_2)_m-\text{CH}_2-$  in copending application '115 where  $m=11$  for the penetrant compound claimed in copending application '115. Although the use of triazolinones is not claimed in '115 the fact that it is used with agrochemically active compounds shows that it can be used with herbicidally active ingredients as well and thus renders the claims obvious. Barron et al. teaches that formulations containing active compounds from the group of the neonicotinyls and emulsifiers such as polyoxyethylene fatty acid esters/ethers and in combination with other known active compounds, such as herbicides ([0023], [0079], [0083]). Therefore, it would be obvious to one of ordinary skill in the art to combine the penetrant with other insecticides or herbicides in order for the agrochemical to have a better effect on the plant.

This is a provisional obviousness-type double patenting rejection.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 17-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kojima et al. (WO 96/31121) in view of Kaneko et al. (US 4,351,753) and Feucht et al. (US 6,395,684 and US 6,562,760).

### **Applicant's Invention**

Applicant claims a method of improving the penetration of a herbicidally active triazolinone into a plant comprising applying to a plant formula (I) and one or more herbicidally active triazolinones. Applicant also claims the composition.

### **Determination of the scope and the content of the prior art**

#### **(MPEP 2141.01)**

Kojima et al. teaches an herbicidal composition which contains at least one adjuvant selected from polyoxyethylene isotridecyl ether (Formula (1)) and a nonselective herbicide (Glyphosinate + DCMU or Bialophos + DCMU) (abstract).

Kaneko et al. teaches polyoxyalkylene block copolymers useful in flowable pesticide concentrates (column 1, lines 8-11). Also, alcohol ethoxylates, such as tridecyl alcohol, 6 mole ethoxylate (Formula (1) wherein  $n=6$ ), plus water is disclosed as a good solvent (column 1, lines 54-57).

Feucht et al. ('760) teaches the selective-herbicidal composition flucarbazone-sodium and methods for selective control of weeds by applying the compositions together with surfactants and/or customary extenders (abstract; column 5, lines 1-14).

Feucht et al. ('684) teaches the selective-herbicidal composition propoxycarbazone-sodium and methods for selective control of weeds by applying the compositions together with surfactants and/or customary extenders (abstract; column 5, lines 5-17).

### **Ascertainment of the difference between the prior art and the claims**

#### **(MPEP 2141.02)**

Kojima et al. does not teach the specific herbicides flucarbazone-sodium or propoxycarbazone-sodium in a combination with Formula (I) wherein  $n=6$  as an herbicidally active formulation, a plant treatment composition. Also, Kojima et al. does not teach the plant treatment composition comprising one or more additives. Kojima et al. does not teach a method of using flucarbazone-sodium or propoxycarbazone-sodium in combination with polyoxyethylene isotridecyl ether.

### **Finding of prima facie obviousness**

#### **Rationale and Motivation (MPEP 2142-2143)**

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Kojima et al., Kaneko et al. and Feucht et al. ('760 and '684) to further include and herbicidal composition comprising a Formula (I) (where  $n=6$  and Q is isotridecyl) and triazolinones of formula (II) such as, flucarbazone-sodium or propoxycarbazone-sodium. One would have been motivated to include Formula (I) where  $n=6$  because this is routine optimization for the flowability of various agrochemical concentrates. Further, one would have been motivated to include flucarbazone-sodium or propoxycarbazone-sodium because they are herbicides and one having ordinary skill in the art knows that herbicides can be used with other adjuvants such as those that enhance their effect on the surface of the plant.

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Kojima et al., Kaneko et al. and Feucht et al. ('760 and '684) to further include Formula (I) (where  $n=6$  and Q is isotridecyl) in a range from (0.1 to about 95%), (0.5 to about 40%) and about (0.02 to about 0.25%) by weight of the

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composition and one or more herbicidally active active triazolinones of Formula (II) in a range from (0.1 to about 95%), (2.5 to about 70%) and (0.01 to about 2%) by weight of the composition. One would have been motivated to include these ranges because it is routine optimization the adjust various components of an herbicidal formulation for application to various plants.

Furthermore, it would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Kojima et al., Kaneko et al. and Feucht et al. ('760 and '684) to further include the composition as stated above with one or more additive in a range from (4.9 to about 80%), (2.5 to about 70%) and about (5 to about 50%) by weight of the composition. One would have been motivated to include these ranges because it is routine optimization add various other adjuvants (eg. defoamers, wetting agent, etc.) to and herbicidal composition to aid in dispersion. Also, it would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Kojima et al., Kaneko et al. and Feucht et al. ('760 and '684) to further include the weight ratio of said one or more triazolinones to said compound of the formula (I) from 1:0.5 to about 1:5. One would have been motivated to include these ratios because it is routine optimization the adjust various components of an herbicidal formulation for application to various plants.

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Kojima et al., Kaneko et al. and Feucht et al. ('760 and '684) to further include a method of using the herbicidal composition comprising Formula (I) (where  $n=6$  and Q is isotridecyl), triazolinones of formula (II) such as,



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flucarbazone-sodium or propoxycarbazone-sodium and one or more additives on plants and/or their habitat. One would have been motivated to include the method of using the composition on plants and/or their habitat because this would aid in the herbicide being absorbed by the plant rather than drifting into water systems due to excessive rain and runoff and thus becoming a hazard to the environment while quickening the herbicidal effect on the plant.

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Kojima et al., Kaneko et al. and Feucht et al. ('760 and '684) to further include the composition comprising Formula (I) (where  $n=6$  and Q is isotridecyl) and triazolinones of formula (II) such as, flucarbazone-sodium or propoxycarbazone-sodium and one or more additives in the form of a spray liquor prepared in a tank-mix method. One would have been motivated the claimed composition as a spray because this would aid dispersion and could be obtained by a common mixing method.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Dahmen et al. (WO 98/12923) and Giencke et al. (US 2001/0011063).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Danielle Sullivan whose telephone number is (571) 270-3285. The examiner can normally be reached on 7:30 AM - 5:00 PM Mon-Thur EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jeffrey Stucker can be reached on (571) 272-0911. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



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